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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
Federal Communications Commission

In the Matter of:

Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992	)	MM Docket No. 92-266
Rate Regulation	)	

To the Commission

JOINT COMMENTS IN RESPONSE TO
FURTHER NOTICE OF PROPOSED RULEMAKING

COLONY COMMUNICATIONS, INC.
CONSOLIDATED CABLEVISION OF
CALIFORNIA, L.P.
CONSOLICATED CABLEVISION OF
MICHIGAN, L.P.
KING VIDEOCABLE COMPANY
MULTIMEDIA CABLEVISION, INC.
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SUMMARY

The Joint Parties contend that as a matter of law the Commission may not, as it has proposed, remove the universe of respondents with under 30% penetration from the sample of cable rates upon which it based its benchmark approach to regulation of basic and cable programming service rates. The Joint Parties do not believe that the 1992 Cable Act requires the Commission to focus solely and exclusively on competitive rates as the sine qua non of its rate regulation program. However, inasmuch as the Commission has chosen to construct benchmarks based upon rates charged by systems which are subject to "effective competition", as that term is defined by the statute, the plain language of the statute, the relevant legislative history and applicable judicial precedent operate to bar the Commission from redefining that term, as it proposes to do in this proceeding.

Moreover, the proposed 28% roll-back would be unwise and improper as a matter of public policy. Reductions of this magnitude will cut deeply into cable's available cash flow which is committed to maintaining, extending and rebuilding cable's existing infrastructure and to developing new programming, services and technologies. Not only will the public be deprived of these benefits but cable will effectively be shackled in its ability to compete with other existing and emerging video service providers. Adoption of

this proposal would force virtually every cable operator to pursue cost-of-service showings, thereby rendering the benchmark approach, which the Commission clearly prefers, to be irrelevant.

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Colony Communications, Inc.*, Consolidated Cablevision of California, L.P., Consolidated Cablevision of Michigan, L.P., King Videocable Company, Multimedia Cablevision, Inc.,

I. INTRODUCTION

In its initial Report and Order in this docket[1], the Commission adopted a benchmark approach to regulation of basic and cable programming service (tier) rates which, after considering several alternatives, it determined should be "based on the rates of systems subject to effective competition." Report and Order at 116 (emphasis added). The Commission premised the benchmark approach on its survey of cable rates in both competitive and noncompetitive markets, as defined by the statute, and constructed a methodology for calculating benchmark rates based on a comparison of those rates.[2]

By its own estimate, the Commission's benchmark methodology will result in a revenue loss of at least one

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[1] Report and Order in MM Docket No. 92-266, FCC 93-177 (May 3, 1993), 58 Fed. Reg. 29736 (May 21, 1993). ("Report and Order"; citations hereinafter will be to the pagination of the text as released by the Commission).

[2] The Joint Parties do not contend or concede that the 1992 Act requires the Commission to focus solely and exclusively on "competitive" rates as the basis for establishing a rate regulation regime; to the contrary, they believe that Congress directed the agency to consider other factors in addition to competitive rates, particularly with regard to cable programming services. The argument of the Joint Parties, as set forth herein, is simply that once the Commission has selected rates for systems which are subject to effective competition as the touchstone of its regulatory program, it may not then freely proceed to redefine the term "effective competition" to achieve a particular result.

billion dollars for the cable television industry[3]. According to trade press reports, the FCC's action will cause rate roll-backs for approximately two-thirds to three-quarters of the nation's cable systems and subscribers[4]. Concurrently with its initial rate regulation decision, the agency proposes to slash another $1.8 billion, or almost twice the amount of its initial cut, from cable revenues by eliminating systems with less than 30% penetration from the survey of cable system rates upon which it relied in creating the benchmark approach. As posed by the FNPRM, the Commission now solicits comments as to:

> whether we should include within the data upon which the competitive rate differential is founded, only rates of systems that face effective competition in the form of competing multichannel service providers[5]

In response, the Joint Parties submit that such a result would be improper as a matter of law and unwise as a matter of regulatory policy. Adoption of this proposal would be an unwarranted departure from the express language and intention

Joint Parties vigorously oppose the Commission's ill-advised and heavy-handed proposal to further reduce industry revenues by an indiscriminate, across-the-board roll-back.

II. THE COMMISSION MAY NOT, AS A MATTER OF LAW, REDEFINE EFFECTIVE COMPETITION AS THAT TERM IS EXPRESSLY SPECIFIED BY THE 1992 CABLE ACT

A. Established Principles of Statutory Construction Require the Commission to Apply The Term Effective Competition As Defined By Congress

A fundamental precept of statutory construction is that "the starting point for interpreting a statute is the language of the statue itself." Consumer Product Safety Comm'n v. GTE Sylvania, 447 U.S. 102, 108 (1980).[6] Here the plain language of the statue is abundantly clear; Section 623 of the Act defines "effective competition" as, inter alia, those markets in which "fewer than 30 percent of the households in the franchise area subscribe to the cable service of a cable system."[7] That section also directs that if a cable system is found to be subject to effective

Evidence of legislative intent to strictly control the meaning and application of a statutory term is particularly [redacted]

Congress and removes any discretion on the part of the Commission. As noted in the House Report:

> In the Committee's view, the FCC's redefinition of effective competition does not obviate the need for a legislative approach to protecting consumers.[10]

The Report then goes on to explain that its test for effective competition includes those situations in which "fewer than 30 percent of households in the franchise area subscribe to cable." House Report at 34. Congressional intent to supplant by legislation the agency's ability to define a central concept of rate regulation is clear; an administrative departure from the legislative command would therefore be inappropriate. Moreover, just prior to the Commission's adoption of its decision to establish the rate regulation rules, it was instructed by the Chairman of the House Committee on Energy and Commerce "that the Commission look for its principal direction and guidance to the express provisions of the Act itself."[11] It is thus incumbent upon the Commission to heed the express language of the statute, the relevant legislative history and the comments of the Committee Chairman responsible for the legislation.

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[10] H.R. Rep. No. 628, 102d Cong., 2d Sess. 33 (1992). The redefinition referred to was the FCC's decision to increase from three to six the number of unduplicated off-air television stations required to establish effective competition in a cable market.

[11] Letter from Chairman John D. Dingell to Chairman James H. Quello, March 23, 1993.

C. Judicial Precedent Constrains the Commission's Ability to Redefine a Statutory Term

As posed by the Commission, the issue in this proceeding is whether:

> we should include within the data upon which the competitive rate differential is founded, only rates of systems that face effective competition in the form of competing multichannel service providers."[12]

A more appropriate way to frame the inquiry, however, is:

> Does the FCC enjoy discretion to adopt, as part of its regulations implementing the Cable Act, a definition of a particular term that is at odds with a definition of that very term contained in the Act itself? The question, we believe, answers itself. The Commission, however, answers yes.[13]

In a strikingly similar parallel to the instant case, the ACLU decision also involved the Commission's implementation of rate regulation rules under the 1984 Act. Although the Court of Appeals concluded that the rules adopted by the FCC were, for the most part, reasonable and consistent with the provisions of the 1984 Act, it held that in certain key respects, the rules failed to pass muster. Specifically, the court held that the FCC's redefinition of the term "basic cable service" exceeded the Commission's authority where Congress had "spoken directly and specifically" by providing

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[12] Report and Order at 347 (emphasis added).

[13] American Civil Liberties Union v. FCC, 823 F.2d 1554, 1567 (D.C. Cir. 1987), cert. denied 485 U.S. 959 (1988) ("ACLU").

a definition of "basic cable service" in Section 602(2) of the 1984 Act.

In assessing the propriety of the Commission's action, the ACLU court applied the commonly employed test set forth by the Supreme Court in Chevron, USA v. NRDC, 467 U.S. 837, 842-43 (1984). Under the Chevron analysis, the court must first examine "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." Id. at 842-43. Applying traditional principles of statutory construction, the court found that, on the issue of defining "basic cable service," the statute spoke with "crystalline clarity" and that "Congress intended its definition of "basic cable service" to be just that -- a comprehensive definition of the term."[14]

ACLU makes it clear that where a statute speaks clearly, deference to an agency's interpretation is inappropriate as a matter of law. See also Board of Governors of the Federal Reserve System v. Dimension Financial Corp., 474 U.S. at 368 ("The traditional deference courts pay to agency interpretation is not to be applied to alter the clearly expressed intent of Congress.") Section 623 of the 1992 Cable Act "speaks with crystalline clarity" on the subject of

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[14] ACLU at 1570 (quoting Chevron, 467 U.S. at 842-43).

what constitutes effective competition for purposes of FCC rate regulation. ACLU, 823 F.2d at 1568. Specifically, Section 623(l)(1) provides a "precise" definition, for purposes of Section 623, of effective competition, the "exact term the Commission now seeks to redefine." Id. Thus, the Commission's proposal to exclude one of three statutorily-mandated tests for effective competition is contraindicated by the plain language of Section 623.

This result is not changed simply because the FCC may conceivably have devised a test which it believes is a better or more accurate measure of a truly competitive rate. Even if the FCC could arguably create a more accurate approximation of competitive rate levels by excluding the less than 30 percent sample from its rate calculations, "the role of agencies remains basically to execute legislative policy; they are no more authorized than are the courts to rewrite acts of Congress." Talley v. Mathews, 550 F.2d 911 919, (4th Cir. 1977). Thus, whether the question is formulated as the FCC did in this proceeding or as the Court of Appeals did in the ACLU case, the answer is the same; the Commission may not adopt a methodology which is at odds with the established statutory standard once it has chosen to base its regulatory program on that statutory term.

III. FURTHER REDUCTIONS IN BENCHMARK RATES WILL HAVE A SIGNIFICANT ADVERSE IMPACT ON CABLE'S ABILITY TO SERVE THE PUBLIC AND TO COMPETE WITH OTHER VIDEO PROVIDERS

Following the release of its 450-page rate regulation Report and Order and associated materials, the Commission has conducted a tutorial on the new rules, has issued several explanatory Public Notices in Question and Answer format, has

$1 billion are likely to be correct.[15] In an article which described the economic impact of the new rate rules as "devastating", Barron's estimated the effect of the initial rate roll-backs on the EBITDA (earnings before interest, taxes, depreciation and amortization) of three major publicly-traded MSOs:[16]:

	EBITDA	Roll-back	Percent
Adelphia Communications	$200 million	$23 million	11.5
Cablevision Systems	$257 million	$49 million	19.0
Tele-Communications, Inc.	$1,856 million	$318 million	17.1

Industry sources confirm these reports; for example, Continental Cablevision estimates a revenue loss of between 60 and 70 million dollars, which represents a 5-6 percent reduction in revenues and a 12-14 percent reduction in cash flow.[17] In its Petition for Stay of the rate regulation rules, filed on June 4, 1993, InterMedia Partners' Chief Financial Officer attested that use of the benchmark methodology:

> "will cause InterMedia to violate its financial covenants in all 3 bank/credit corporation financings and will likely prevent us from obtaining a needed working capital line in the fourth. . .

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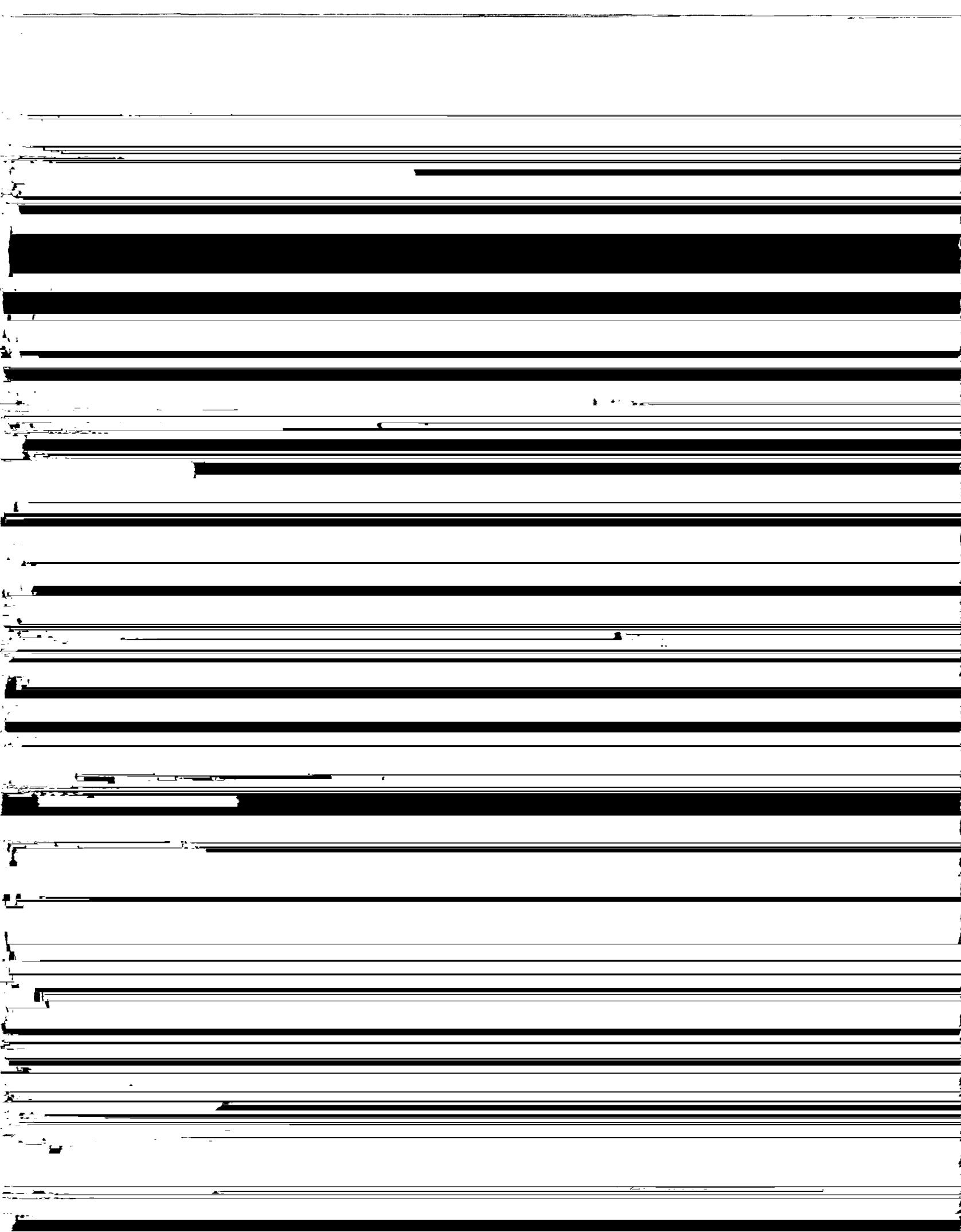
[15] Why Wall Street Goofed on Cable's New Rules, N.Y. Times, May 10, 1993, at D6.

[16] Abelson, Up & Down Wall Street, Barron's, June 7, 1993 at 1. The estimates assume a roll-back of 10% on basic and expanded basic, which account for 65% of total revenues, and 2% for rate increases since 9/30/92.

[17] FCC Rate Rollbacks Clobbering MSOs, Multichannel News, May 31, 1993 at 1.



would equate to a 20% cash flow loss. Kagan's estimates graphically illustrate the impact of a $1 billion rate roll-back; of the $1.773 billion remaining after debt service and

amount of this additional expense pending the outcome of broadcaster/cable operator negotiations, observers in both industries forecast a possible retransmission payment, in cash and cash equivalents, in the $500 million to $1 billion range.[21]

In the introduction to its Report and Order in this proceeding, the Commission aptly characterized its task as:

> The challenge presented by this situation was how to preserve and extend the benefits of increased investment, programming diversity, and technical innovation that cable provides while protecting subscribers from noncompetitive rate levels.[22]

The preceding analysis starkly illustrates that the Commission's proposal in this rulemaking will neither "preserve" nor "extend" any of the positive benefits of cable which both Congress and the Commission have clearly recognized. To the contrary, it will demonstrably reverse cable's present ability and future potential to serve the public by eliminating, at a minimum, almost half of its projected investment in maintenance, upgrades, rebuilds and

The Joint Parties recognize that one of the goals of the 1992 Act, in addition to consumer protection through regulation, is the promotion of competition. It is no answer to say, however, that as competition develops, either from DBS or from other terrestrial service providers, the cable industry will no longer be subject to rate regulation and these problems will disappear. By that time cable will have been so severely hindered in its investment capability that it will effectively be unable to engage in facilities and

language of the Cable Act. Additionally, it will adversely, and improperly, impair cable's ability to compete and to serve the public. In sum, the proposal to eliminate markets

the low penetration markets from its survey of effective competition rates.

Respectfully submitted,

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